

1 HON. THOMAS S. ZILLY  
2  
3  
4  
5  
6  
7  
8

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 RYAN DIAZ,

10 Plaintiff,

11 v.

12 NINTENDO OF AMERICA, INC.,

13 Defendant.

NO. 2:19-cv-01116-TSZ

**DECLARATION OF BENJAMIN F.  
JOHNS IN SUPPORT OF  
PLAINTIFF'S MOTION TO  
APPOINT INTERIM CO-LEAD  
COUNSEL**

14 I, Benjamin F. Johns, declare as follows:

15 1. I am a partner at the law firm of Chimicles Schwartz Kriner & Donaldson-Smith  
16 LLP (“CSK&D”) in Haverford, Pennsylvania and counsel for Plaintiff Ryan Diaz (“Plaintiff”)  
17 in the above-captioned action. I submit this declaration in support of Plaintiff’s Motion to  
18 Appoint Interim Co-Lead Counsel. I have personal knowledge of the information contained  
19 herein, and if called as a witness I could and would testify competently thereto.

20 2. On July 19, 2019, Plaintiff filed a Complaint against Defendant Nintendo of  
21 America, Inc. (“Nintendo”), on behalf of himself and a proposed class of consumers who  
22 purchased the Nintendo Switch gaming system (“Switch”) and Joy-Con gaming controllers.  
23 ECF No. 1. The Complaint alleges that the Joy-Cons suffer from a common defect known as

DECLARATION OF BENJAMIN F. JOHNS IN SUPPORT OF  
PLAINTIFF'S MOTION TO APPOINT INTERIM CO-LEAD COUNSEL  
(2:19-cv-01116-TSZ) - 1

TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
TEL. 206.682.5600 • FAX 206.682.2992

1     “drift,” which causes characters or action on the game screen to move in a direction without  
 2     command by the gamer or engagement of the Joy-Con (the “Drift Defect”). The Complaint  
 3     alleges that the Drift Defect renders the Switch difficult to operate, non-responsive, and  
 4     otherwise unsuitable for gameplay. *Id.*

5                   **A.     Background Information About Myself.**

6                   3.     I am admitted to practice before the Supreme Courts of Pennsylvania and New  
 7     Jersey and various federal courts across the country. I was admitted *pro hac vice* on behalf of  
 8     Plaintiff in this case on July 19. ECF No. 5. I am in good standing in every court in which I  
 9     have been admitted to practice, and have never been subjected to any disciplinary proceedings.

10                  4.     Below is a sampling of the class actions in which I have played a significant role  
 11    in prosecuting over the course of my legal career:

- 12                  • *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK (S.D. Fla.)  
 13    (MDL proceedings involving allegations that dozens of banks reordered and  
 14    manipulated the posting order of debit transactions. Settlements collectively in  
 15    excess of \$1 billion were reached with several banks; CSK&D was a Team Leader  
 16    in actions against U.S. Bank (\$55 million settlement) and Comerica Bank (\$14.5  
 17    million settlement));
- 18                  • *In re Nexus 6P Products Liability Litig.*, No. 5:17-cv-02185-BLF (N.D. Cal.) (\$9.75  
 19    million class action settlement in a case involving allegedly defective smartphones,  
 20    which received preliminary approval on May 3, 2019);
- 21                  • *Weeks et al. v. Google LLC*, No. 18-cv-00801-NC (N.D. Cal.) (\$7.25 million  
 22    settlement reached in another case involving allegedly defective smartphones, which  
 23    received preliminary approval on July 22, 2019);
- 24                  • *In re: Elk Cross Timbers Decking Marketing, Sales Practices and Products Liability  
 25    Litig.*, No. 15-cv-18-JLL-JAD (D.N.J.) (MDL proceeding involving allegedly  
 26    defective wood-composite decking, which ultimately resulted in a settlement valued  
 27    at approximately \$20 million); and
- 28                  • *Physicians of Winter Haven LLC, d/b/a Day Surgery Center v. STERIS  
 29    Corporation*, No. 1:10-cv-00264-CAB (N.D. Ohio) (CSK&D was sole lead counsel  
 30    in this case, which resulted in a \$20 million settlement on behalf of hospitals and

1      surgery centers that purchased a sterilization device that allegedly did not receive  
 2      the required pre-sale authorization from the FDA).

3      **B.      Background Information about my Firm.**

4      5.      My law firm, CSK&D, is a leading class action firm with a national practice,  
 5      having recovered billions of dollars on behalf of institutional, individual, and business clients.  
 6      As further detailed in our firm resume (submitted herewith as Exhibit A), CSK&D has  
 7      extensive experience litigating complex class action cases, including cases involving defective  
 8      consumer electronics. Some of CSK&D's significant recoveries include the following:

- 9      • *Rodman v. Safeway Inc.*, No. 3:11-cv-03003 (N.D. Cal.) (lead counsel in this  
 10     consumer class action lawsuit alleging that a large supermarket chain charged more  
        for products sold through its online grocery delivery service than at physical stores;  
        plaintiffs obtained a judgment of \$41.9 million, which was subsequently affirmed  
        by the Ninth Circuit);
- 11     • *In re Apple iPhone/iPod Warranty Litig.*, No. 3:10-cv-01610-RS (N.D. Cal.) (\$53  
 12     million class action settlement on behalf of consumers who were denied warranty  
        coverage by Apple based on so-called liquid indicators, which are small pieces of  
        paper, akin to litmus paper, installed in the headphone jack and/or charging port of  
        certain iPhone and iPod touch devices);
- 13     • *Lockabey, et al. v. American Honda Motor Co., Inc.*, No. 37-2010-00087755-CU-  
 14     BT-CTL (Super Ct. San Diego) (final approval granted to a settlement that was  
        valued by the court at approximately \$170 million and conferred a substantial  
        benefit on nearly 450,000 consumers); and
- 15     • *In re Kinder Morgan Shareholders Litig.*, No. 06-C-801 (Dist. Ct. Kan., Div. 12)  
 16     (served as co-lead counsel in this case that resulted in the creation of settlement fund  
        in the amount of \$200 million).

17     6.      CSK&D maintains offices in Haverford, Pennsylvania and Wilmington,  
 18     Delaware, and currently employs 18 attorneys and three paralegals. CSK&D has the resources  
 19     necessary to effectively prosecute this case on behalf of Plaintiff and putative Class members.  
 20     If I am appointed to a leadership position, my firm could and would devote the necessary  
 21     resources to doing so.

### C. CSK&D' Work in Identifying and Investigating Potential Claims.

7. CSK&D has done significant work in investigating and developing potential claims of the putative Class.

8. Since filing the Complaint, CSK&D has received over 20,000 complaints from consumers related to the Drift Defect and this lawsuit. CSK&D has communicated with and gathered information from a significant number of those consumers in developing this case, and is conducting an ongoing investigation of the claims and defenses in this lawsuit. Our firm continues to speak with aggrieved consumers on a regular basis.

9. Throughout the entirety of CSK&D's investigation, my firm has researched viable claims under federal and state law on behalf of the class, as well as potential defenses that Nintendo may assert. My firm has formally retained two experts—a hardware design engineer and a metallurgical engineer—to inspect and perform teardowns on the controllers at issue as part of the ongoing investigation and in connection with preparing an Amended Complaint. My firm also prepared and sent to Nintendo a detailed evidence preservation letter on July 22, 2019.

10. I am confident in that my firm and our co-counsel at the Tousley Brian Stephens firm can work together cooperatively and efficiently as co-lead counsel on behalf of Plaintiff and the putative Class.

I declare pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 20th day of August, 2019, at Haverford, Pennsylvania.

/s/ Benjamin F. Johns  
BENJAMIN F. JOHNS

## **CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED at Seattle, Washington, this 20th day of August, 2019.

s/Kim D. Stephens  
Kim D. Stephens

6639/001/541205.1

DECLARATION OF BENJAMIN F. JOHNS IN SUPPORT OF  
PLAINTIFF'S MOTION TO APPOINT INTERIM CO-LEAD COUNSEL  
(2:19-cv-01116-TSZ) - 5

**TOUSLEY BRAIN STEPHENS PLLC**  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
TEL. 206.682.5600 • FAX 206.682.2992